IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16180 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHIRIPAL TWISTING & SIZING PVT.LTD. & 3 - Petitioner(s)

Versus

UNION OF INDIA THR' SECRETARY & 2 - Respondent(s)

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Appearance :
MR PARESH M DAVE for Petitioner(s) : 1 - 4.
MR JM MALKAN FOR MR PJ MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2,
DS AFF.NOT FILED (N) for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 30/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 Heard Mr.P.M.Dave, learned Advocate for the petitioner and Mr.J.M.Malkan for the respondents.

2 Rule. Mr.Malkan waives service of Rule. Considering the fact that the dispute lies in a very narrow compass the petition is taken up for final hearing and disposed of today.

3 On 12/06/2003 an order came to be passed by Central Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, whereby it dismissed the appeal of the petitioner. The petitioner moved an application for rectification of mistake in the order dated 12/06/2003. This application was filed on 17/10/2003. BY order dated 11/02/2005 the Rectification of Mistake Application came to be rejected by the Tribunal in the following terms :

> “2. The present application has been filed seeking rectification of Bench Order dtd. 12/06/2003. Such rectification has been sought on the

grounds that the Tribunal has not taken into consideration important grounds taken in the appeal and during the course of hearing including the applicants' grievance regarding violation of principle of natural justice before the Original Authority. We find that the learned Advocate who had argued the case before the Bench earlier is not present during the hearing of the R.O.M. Application. Since the case was argued at length by the Advocate on record on 29/04/2003 and the points argued by him have been taken into account while recording the earlier order of the Bench, the grounds taken in the R.O.M. application lack substance. Moreover, the appellants are trying to seek a review of the earlier Bench order through an R.O.M. application which is not permissible. As such, the R.O.M. application is

rejected".

4 It is the contention of the petitioner that one of the principal grounds urged before the Tribunal was violation of principles of natural justice as the petitioner was not given reasonable opportunity of defending itself and was not granted personal hearing. It is submitted that this was taken as ground of appeal when the appeal was filed before the Tribunal, the same was pressed at the time of hearing of the appeal before the Tribunal, and yet the Tribunal has failed to deal with the same. In support of its stand the petitioner has placed on record affidavit dated 10/08/2005 of Shri V.M.Doiphode, Advocate, who had conducted the appeal before the Tribunal. It was therefore urged on behalf of the petitioner that in the circumstances, the Tribunal must be directed to deal with the Application of Rectification of Mistake and in turn the appeal to the aforesaid extent so as to enable the petitioner to exercise its statutory right of appeal effectively and substantially.

5 Mr.Malkan, appearing on behalf of the respondent authorities read out from the impugned order of Tribunal dated 11/02/2005 pointing out that the Rectification of Mistake Application had been rejected on three grounds :

Firstly, that the case was argued by an Advocate who was not present at the time of hearing of the application; secondly, all the points argued by the Advocate who had appeared at the appeal hearing had been taken into consideration by the Bench; and thirdly, that the assessee was trying to seek review of the earlier order of the Bench. He also tried to place reliance on the order of Commissioner to insist that the grievance regarding violation of principles of natural justice was not correct, in as much as, the Commissioner had given an opportunity of hearing.

6 The Tribunal could not have recorded in its impugned order dated 11/02/2005, as one of the grounds for rejection, the absence of the Advocate

who had conducted appeal before it. If at all, it was found necessary to ascertain factually whether the said ground was in fact urged before it at the time of hearing of the appeal or not, the Tribunal ought to have called upon the petitioner either to tender an affidavit of the Advocate concerned or call upon the petitioner to ask the Advocate to remain present before the Tribunal. It is necessary to note that zerox copy of the Rectification of Mistake Application which has been placed on record of these proceedings shows that the application was drafted by the learned Advocate who had appeared before the Tribunal at the time of hearing of appeal, not only that, even verification has been countersigned by the learned Advocate. In these circumstances, the Tribunal should have been slow in rejecting the application on this count.

7 The finding recorded by the Tribunal that it has taken into consideration all the points argued before it while passing the earlier order in appeal and that the assessee was trying to seek review of

the earlier order is not borne out from the record. Order dated 12/06/2003 made by the Tribunal in appeal does not, on a cursory glance, show that the Tribunal had dealt with the grievance of the assessee regarding violation of principles of natural justice. In the circumstances, non consideration of a specific ground raised before it and urged by the Advocate would amount to an apparent error. The Tribunal ought to have dealt with the same on merits.

8 Though the petitioner has made a prayer to quash and set aside both the orders of the Tribunal, rendered in Appeal on 12/06/2003 (Annexure-K) and rendered in Rectification of Mistake Application on 11/02/2005 (Annexure-M), in the view that the Court has taken, it is not necessary to quash and set aside the earlier order in appeal and the relief is restricted to quashing and setting aside the subsequent order dated 11/02/2005 made in Rectification of Mistake Application.

9 Accordingly, order dated 11/02/2005 (Annexure-M)

made by the Tribunal in Rectification of Mistake Application is quashed and set aside and the application is restored to file of the Tribunal. The Tribunal shall hear and decide the same on merits in accordance with law.

10 The petition is allowed accordingly to the aforesaid extent. Rule made absolute. The respondent-revenue to pay cost quantified at Rs.2500/- only.

(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt